

Supreme Court considers disclosure matters in case to set aside purpose trusts

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In the recent judgment of *Trustee 1 and others v The Attorney General and others* (2014) SC (Bda) 24 Com, the Bermuda Supreme Court explored the limits of legal advice privilege in Beddoe proceedings relating to purpose trusts. It ruled that the trustees of several related Bermuda purpose trusts (the "Trusts") could not claim legal advice privilege in the Beddoe proceedings against a person who was at war with the trusts in seeking as heir of the settlor to set the Trusts aside for having been procured by *inter alia* undue influence.

The Beddoe decision, made in the course of the hearing of a discovery application, and has been published in anonymised form to protect the identity of the parties. The main action and the Beddoe proceedings are believed to be the first cases involving attempts to set aside purpose trusts in Bermuda.

The plaintiff in the main action – who is a defendant in the Beddoe proceedings -- claims to stand in the shoes (as representative of the estate and heirs) of his late father, from whom he alleges the assets of the Trusts were derived.

Although purpose trusts have no beneficiary who would ordinarily be concerned with enforcement of the trusts, the Supreme Court has the power to make orders for enforcement on the application of (*inter alia*) the settlor: s. 12B (1) of the Trusts (Special Provisions) Act 1989.

Counsel for the son argued that the settlor of a Bermuda purpose trust is in a position analogous to that of a beneficiary of the trust and should therefore be entitled to full and frank disclosure of documents on which the trustees rely in seeking the approval of the court in Beddoe proceedings to defend legal proceedings at the expense of the trust fund; and should on request of a settlor (or of a person – as here - standing in the shoes of the settlor) order the trustees of a purpose trust to disclose to the settlor legal advice and communications between the trustees and their lawyers.

The Beddoe judge accepted the son's argument that by virtue of the Trustees seeking an order (although not yet made) appointing the son to represent the estate and heirs of the father in those proceedings, the son stood prospectively in the shoes of the settlor and was a person with sufficient interest in the enforcement of the Trusts (notwithstanding that the son would clearly not seek to enforce the trusts given that he disputed their validity).

(The Trustees had sought an order that the son be appointed representative of the heirs and the estate of his late father. If appointed, any judgment or order in the proceedings would be binding on all the heirs of the father's estate, pursuant to Order 15 rule 12 of the Rules of the Bermuda Supreme Court).

The son's application for disclosure of documents from the Trustees was made in reliance on their duty of full and frank disclosure; and further on the grounds that the documents having been referred to in affidavits filed on behalf of the Trustees in the Beddoe proceedings were required by rules of court to be made available for inspection.

In the circumstances, the judge held that it was "inappropriate for the Trustees to assert legal advice privilege against the (son) with respect to the draft document" and, as he was satisfied production of the document was necessary for the fair disposal of the Beddoe proceedings, he ordered its production.

The case raises important questions regarding the position of settlors of purpose trusts in Beddoe proceedings; and their rights to full and frank disclosure of documents from the trustees of purpose trusts even though they (or their legal representatives following the death of the settlor) may have adverse interests in their personal capacity; and the limitations of legal advice privilege in Beddoe proceedings.

See Court decision [here](#).